No. 93-1102

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

VALUTRON, N.V., ARISTA, N.V., S. PRESTLEY BLAKE, LLOYDS BANK INTERNATIONAL (BAHAMAS), LTD., as Trustee for BONNYBROOK CHARITABLE TRUST, CLIFF RESOURCES CORPORATION, FEDERATION OF AMERICAN SCIENTISTS FUND, BERNARD FISHER, CASEY FISHER, DAVID L. HILL, LOUIS MARX, JR., RODMAN G. PRICE, NOEL FUND, INC., SIERRA VENTURES, LAURA ROGAL OLAH, as administratrix for the estate of EDWARD ROGAL, and S. FRED SINGER,

Petitioners,

v.

NCR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Rule 29.1 Statement

The parent companies and subsidiaries (except wholly owned subsidiaries) of NCR Corporation are American Telephone and Telegraph Company.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. CONCISE STATEMENT OF THE CASE

A. OVERVIEW

The two questions presented by Valutron are based upon factual assertions directly contrary to the record in this case.

QUESTIONS PRESENTED

(1) When the patent rights of an independent inventor[1] are pitted against a large corporate infringer,[2] with the prospect of expensive litigation for enforcement of the patent rights, can the patent owner be deemed to sleeping on his rights and thus guilty of laches because of delay in bringing suit for the interval required by diligent

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[1] Valutron is not an independent inventor. It is a Dutch Antilles company who sold investment interests in the Rogal patent for $4.5 million. This sum (minus expenses) is retained by Valutron even if there is no recovery.

[2] NCR never infringed the Rogal patent. At trial, there was no proof of infringement.

effort[3] to obtain the funding needed for patent enforcement?[4]

(2) Whether ignoring the "bursting bubble" theory of a presumption[5] violates Federal Rules of Evidence Rule 301 and denies due process of law by improperly shifting the burden of proof on the issue of laches?[6]

Further, even if there were factual support for the questions presented, Valutron has not set forth any "special and important reasons" as required by this Court's rule 10 for granting the petition.

B. COMMERCIAL POINT OF SALE SYSTEMS

A point of sale system is an electronic accounting system involving a number of transmitters (electronic cash

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[3] The district court held that the funding effort was less than diligent. It should have begun in 1970, not 1974.

[4] Although Valutron now contends that it did not have sufficient funding until late in 1981, its position before the district court was that it had sufficient funding early in 1978.

[5] The district court did not ignore the evidentiary limitations of a presumption.

[6] The district court repeatedly emphasized that it was not shifting the burden of proof.

registers) connected to a memory through a switching system. The system gets its name from the fact that the transmitters are located at various points of sale.

Due to the unavailability of low cost electronic data storage, retail store point of sale systems were not developed until the late 60's with the advent of large scale integrated circuits. The NCR 280-725 electronic cash register came on the market by mid 1973 and was a popular and commercially successful system. The development of the 280-725 at NCR involved a work force of over 70 people and a cost of at least $20 million. NCR did not copy the Rogal patent nor did it get any benefit therefrom during its development of the 280-725.[7]

The Rogal system never became a commercial system. In fact, there is no indication that even a model or a prototype was ever built.[8]

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[7] If, as Valutron implies, NCR copied the Rogal system, there would have been no need for such a massive development effort.

[8] The record clearly and unequivocally refutes Valutron's bold and unsupported assertions in its petition that the Rogal patent was "a basic pioneer patent" (at 4) and that the Rogal invention "revolutionized" (at 5) the industry and was comparable to the discovery of "penicillin and streptomycin antibiotics" (at 18).

C. THE ROGAL PATENT

Like point of sale systems prior thereto, the Rogal patent is directed to an electronic accounting system involving a number of transmitters connected to a memory through a switching system.

The disclosure in the Rogal patent is rudimentary at best. Valutron's former expert, Professor Julian Bigelow, stated in his deposition that "[t]here are quite a few gaps and difficulties with the presentation here. It would be a long story to discuss them all."

Disregarding for the moment the many gaps and difficulties, the structure actually disclosed was, as Professor Bigelow described it, "very much Rube Goldberg." Valutron's technical expert at trial, Dr. Melville Clark, agreed that a person of ordinary skill in the art "would have some difficulties in building the system described in the Rogal patent."[9]

Prior to suit, Valutron was specifically warned by its counsel that infringement could not be proved by

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[9] This testimony is in fundamental disagreement with Valutron's fanciful and unsupported assertions in its petition that the Rogal patent is directed to "a highly meritorious and widely misappropriated invention" (at 19) that "was the first teaching of a basic technology utilized on a daily basis by most Americans, as in the purchase of gasoline from an electronic pump or the purchase of groceries in a modern supermarket" (at 19).

merely reading the words of the Rogal means-plus-function claims on the NCR structure.

> However, the issue of infringement of the Rogal patent (indeed, of any patent) and its resolution depends on factors in addition to the application of the literal terms of the claims to the system in question.

Valutron was also warned by its counsel that the NCR system was significantly different from the disclosure of the Rogal patent.[10]

> In the case of the Rogal patent, we must point out that the description and drawings on which Rogal's claims are based do not describe a point-of-sale system in terms of the electronics technology currently in use.

Because of the significant difference between the NCR system and the disclosure of the Rogal patent, Valutron was specifically cautioned by its counsel that (1) a conclusion of infringement was heavily dependent upon expert testimony and (2) a qualified expert who could testify favorably on this issue "has not been identified to this time."

> This fact makes it more difficult to predict whether a Court will find that a contemporary system, such as that sold by

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[10] This statement by Valutron's counsel is directly contrary to Valutron's "copying" implication.

> NCR, is within the permissible scope of a patent claim and whether the court will conclude, therefore, that rights under the patent are infringed. A favorable conclusion will depend heavily on the Court's evaluation of the expert testimony presented for and against infringement of the Rogal patent. We expect that a qualified expert who will testify favorably on the issue of infringement of the Rogal patent can be found; as you know, such an expert has not been identified to this time.

At trial, such an expert still had not been found and no such testimony was offered.

In order to delay the start of the laches clock, Valutron implies that its knowledge of the NCR system was not knowledge that the NCR system was an infringing system. However, Valutron told a far different story to its investors and prospective investors and, in particular, specifically represented to them that the claims of the Rogal patent are directed to "general system structural features", "there is no apparent way to construct a POS [point-of-sale] system which does not infringe the basic claims of the Rogal patent" and "this [point-of-sale] equipment cannot be built to operate without infringing directly upon these Claims." Valutron further represented to its investors and prospective investors that the Rogal patent covered not only all point-of-sale systems but, also, automatic teller systems, financial transaction systems, factory data collection systems and bank teller systems.

D. VALUTRON'S INVESTMENT PROGRAM

Valutron's investment program was a risk free proposition for Valutron (but not for its investors) and Valutron will realize a handsome profit even if its petition is denied.

Valutron's investment program consisted of selling interests in the Rogal patent and obtaining from the purchaser the authority to pursue litigation on his or her behalf. Valutron advised its prospective investors of an expected recovery of "$270 million to $378 million" and that "[t]he total income received, per investment unit may be as much as $3 million." If litigation is successful, the investor shares in the funds received. However, if litigation is unsuccessful, the investor loses all of his or her investment. Valutron retains the funds received, minus the litigation expense, no matter the outcome of the litigation. At the time of trial, Valutron had obtained about $4.5 million.

Valutron initially sold interests in the patent in suit beginning in 1974 at a price of $30,000 for a 1% interest. Over the years, this price rose and, by 1984, sales were at a price of $150,000 for a 1% interest. The total funds obtained prior to trial in 1984 were about $4.5 million. Even if no further shares were sold, even if litigation fails and even if litigation expenses were $1.5 million as Valutron now asserts, Valutron would be left with a profit of $3 million plus the interest on the $3 million since

1984. The other investors receive nothing.[11] One investor complained that the funds for the litigation were diverted for other purposes and insisted that his investment be returned.

E. THE HILL-NCR CONTACTS

On April 12, 1978, Dr. Hill wrote NCR asserting infringement of the Rogal patent. He advised that a "careful analysis" had been made and that the Rogal claims read "element by element" on present day systems.[12] The NCR system asserted to infringe was not identified. Although Valutron asserts that it offered NCR a license, no terms were offered with the result that it was little more than an invitation for NCR to make an offer, an invitation that was not accepted.

On May 31, 1978, NCR's Corporate Patent Counsel, J. T. Cavender, replied and requested Valutron to identify the NCR system asserted to infringe. He also requested an element by element reading which, as noted above, had been mentioned in Valutron's letter.

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[11] Contrary to the implication set forth in Valutron's petition (at 5 and 6), the primary motivation for this program was not "the benefit of Mr. Rogal's estate."

[12] By January, 1981, similar letters were sent to 27 other accused infringers in which Dr. Hill asserted infringement with respect to 16 point of sale systems, 10 financial transaction systems, 3 factory data collection systems, an automatic teller system and a bank teller system.

Valutron's assertion that it repeatedly reasserted its claim of infringement in greater detail at NCR's request is patently false. Mr. Cavender's only request was in his May 31 letter and he only requested (1) identification of the system asserted to infringe, hardly an unreasonable request, and (2) an element by element reading which Valutron, in its first letter, stated had already been prepared.

On January 22, 1979 after a delay of almost eight months, Dr. Hill identified the 280-725 but did not provide the requested element by element reading. On February 22, 1980, after a delay of 13 months from his last letter, and after a delay of almost 21 months from NCR's letter, Dr. Hill finally provided the requested element by element reading. On June 23, 1980, NCR's Senior Patent Attorney, Stephen Jewett, replied and (1) questioned the validity of the Rogal patent and (2) specifically declined a license. On December 30, 1980, after a delay of more than six months, Valutron wrote to NCR asserting patent validity.

On August 24, 1981, after a delay of almost another eight months, Valutron brought suit. This delay, as explained by Dr. Hill, was not attributable to any supposed negotiations with NCR, but, rather, to negotiations with IBM. That there never were any negotiations between Valutron and NCR is clear from Dr. Hill's testimony that the door for such negotiations was never opened.

> We [Valutron] were hopeful of negotiations with N.C.R., but we didn't have responses

of a nature from N.C.R. that opened the door for negotiations.

In its petition, Valutron tries to explain its 21 month delay in providing the element by element reading requested by Mr. Cavender by asserting that it was waiting for him to review the Rogal file wrapper. Valutron further asserts in its petition (at 30) that "NCR had unclean hands because it procrastinated in failing to fulfill its promise to communicate its views regarding the assertion of infringement." This assertion is plainly rejectable on two grounds. First, it was never made to the district court and, as noted by NCR during the Federal Circuit appeal, it cannot be raised for the first time on appeal.[13] Second, it is totally factually without support. Mr. Cavender could not reply to Valutron's infringement assertion until Valutron identified the system asserted to infringe and provided the element by element reading.

Contrary to Valutron's implication in its petition, Dr. Hill was no novice as to patent law.[14] He was well aware that the doctrine of laches could bar Valutron's claim. There is nothing to indicate that he was relying

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[13] If NCR's conduct were as egregious as Valutron now asserts, it is surprising that Valutron could have so totally overlooked it before the district court.

[14] Valutron's attempt in its petition to portray Dr. Hill as naive with respect to business matters is directly contradicted by Dr. Hill's arrangement with his investors where he is assured a multi-million dollar recovery even if his investors recover nothing.

upon a negotiations or lack of funding excuse to justify Valutron's delay. On the contrary, as Dr. Hill advised his prospective investors,

> The doctrine of laches would not apply in our case because infringement did not begin until June of 1970 and we shall be starting enforcement action in 1977, well in advance of June 1979 when the defendants might begin to obtain relief from liability as a result of our delay in demanding royalty payments. [Apparently, Dr. Hill thought the applicable laches period was nine years rather than six years.]

Further, despite advice that he commence enforcement of his patent, Edward Rogal deliberately put enforcement on the back burner pending further development of the point of sale market and his own ability to enter that market with a competitive product. This policy of deliberate silence was continued until his death in April, 1974. Subsequently, Dr. Hill continued to sit back while at the same time monitoring increasing marketplace growth and entries of new products.

Even if this Court desired to re-examine the well-settled rule that lack of funding does not excuse an unreasonable delay in filing suit, in order, as requested by Valutron, to create an exception on behalf of the independent inventor facing expensive litigation against a large corporation, this case does not present the facts on which to consider such a rule. This is not a case where an independent, impecunious inventor desired to bring an enforcement action but lacked the funding to do so.

Rather, the inventor, Rogal, made a conscience decision not to enforce his patent, desiring instead to attempt to commercialize it. Thus, this case has nothing to do with the patent rights of an independent inventor. Rather, it involves the rights of a corporation formed for the purpose of making money through patent litigation, whether it wins or not, and of investors whose only interest in "promoting the useful arts" is the speculative chance of recovering on an investment if infringement is found. Whatever equities might have favored inventor Rogal had he attempted but failed to raise litigation funds in a reasonable time, those equities do not apply to the plaintiffs in this case who approached patent litigation as a commercial venture and who failed to pursue it diligently enough to protect their investment interest.

II. SUMMARY OF THE ARGUMENT

Valutron's argument appears to be that (1) most important inventions are made by "impecunious" inventors, (2) such an inventor must raise $500,000 before bringing suit and (3) important inventions will not be made unless impecunious inventors are exempted from laches. These assertions are baseless and can hardly constitute the "special and important reasons" necessary for granting the writ.

Valutron's lack of funding argument was so insubstantial that it was not made to the district court. Further, the district court found that Valutron had sufficient funding. Also, Valutron acknowledged before the district court that it had sufficient funding.

The district court was careful not to shift the burden of proof and, indeed, in its opinion, repeatedly noted that it would be improper to shift the burden of proof.

III. ARGUMENT

A. THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING THE WRIT

This Court's rule 10 provides in pertinent part that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." "[W]hile neither controlling nor fully measuring the Court's discretion," rule 10 does indicate the "character of reasons" that will be considered. Valutron's lack of funding argument is far afield from any of these exemplars.

More particularly, there is no "conflict with the decision of another United States court of appeals on the same matter." Similarly, there is no assertion that the Federal Circuit "decided a federal question in a way in conflict with a state court of last resort," "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision," "decided an important question of federal law which has not been, but should be, settled by this Court" or "decided a federal question in a way that conflicts with applicable decisions of this Court."

Valutron's argument appears to be that (1) most important inventions are made by "impecunious" inventors, (2) such an inventor must raise $500,000 before

bringing suit and (3) important inventions will not be made unless impecunious inventors are exempted from laches.[15]

These assertions are baseless. First, important inventions are more likely to be made by inventors working in well equipped research facilities. Second, there is no requirement that an inventor raise $500,000 before bringing suit. There is no difficulty in obtaining contingency representation for a meritorious patent claim. Third, impecunious inventors will not cease attempting to invent if not exempted from laches.

In the case at bar, if the Rogal infringement claim were meritorious, there would have been no difficulty in obtaining contingency representation. However, such contingency representation would not have permitted Valutron the opportunity to obtain $4.5 million which, minus expenses, it will retain even if the other investors recover nothing.

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[15] Valutron, in its petition (at 23-24), asserts that "if the impecunious inventor is not allowed the time to raise the necessary capital [$500,000] so that he may enforce his patent rights and so retain a reasonable fraction of the wealth created by his invention, the nation will become the poorer through choking down the flow of seminal inventions from what may be our most productive source - the independent and often impecunious inventor."

B. VALUTRON'S LACK OF FUNDING ARGUMENT, BESIDES NOT BEING MADE TO THE DISTRICT COURT, WAS FACTUALLY UNSUPPORTABLE

1. VALUTRON'S LACK OF FUNDING ARGUMENT WAS NOT MADE TO THE DISTRICT COURT

At the conclusion of trial, the district court set a briefing schedule in which, rather than having simultaneous briefs, Valutron was to file first, NCR was to file its response and Valutron was to file its reply. Valutron's main brief included no mention of NCR's laches defense. Rather, Valutron appeared to be of the view that, since laches was an affirmative defense, it did not have to respond to this defense until it was first set forth in NCR's brief. NCR's laches defense was, of course, included in its brief.[16]

Since Dr. Hill, at trial, took the position that the delay in filing suit was at least party attributable to his supposed lack of funds, NCR's brief included a response to this

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[16] NCR cited cases adhering to the general rule that lack of funding is not a sufficient excuse for an unreasonable delay in filing suit. Leggett v. Standard Oil Co., 149 U.S. 287, 294 (1893); Gillons v. Shell Co. of California, 86 F.2d 600, 606 (9th Cir. 1936); Collison Surgical Eng. Co. v. Murray-Baumgartner S. Inst. Co., 230 F. Supp. 572, 580-81 (D. Md. 1964); Technitrol, Inc. v. Memorex Corporation, 376 F. Supp. 828, 833 (N.D. Ill. 1974), aff'd, 513 F.2d 1130 (7th Cir. 1975); Coleman v. Corning Glass Works, 619 F. Supp. 950, 954 (W.D.N.Y. 1985).

lack of funds, NCR's brief included a response to this anticipated argument. However, the anticipated argument never materialized. Valutron, in its reply brief, did not assert any lack of funding in response to NCR's brief. On the contrary, Valutron's reply brief stated that Dr. Hill had enough money in 1978 "to begin, if not to finish" his enforcement program.

The district court in its decision only commented upon Valutron's supposed lack of funding because NCR's brief included its response to Valutron's anticipated but never made argument. Since the argument never materialized, the district court ruled upon an argument which Valutron later decided it did not choose to make. Valutron's failure to make this argument is pertinent in two respects. First, Valutron should not be permitted to now make this argument for this first time on appeal. Second, that Valutron chose not to make this argument before the district court indicates that it is of little merit.

2. THE DISTRICT COURT FOUND AND, INDEED, VALUTRON ACKNOWLEDGED, THAT IT HAD SUFFICIENT FUNDING

Valutron now asserts that, until late 1981, it lacked sufficient funds to bring suit. However, (1) this argument was not made to the district court, (2) it is improperly made for the first time on appeal and (3) it is contrary to the position taken by Valutron during its opening argument at trial. More particularly, during opening argument, Valutron acknowledged that sufficient funding was present in 1978. As stated by Valutron's counsel,

> It took some time for Dr. Hill to find money to adequately finance such an enforcement procedure, but along about 1978 he found, he believed that he had adequate financing, and he began to notify a number of companies in this business of the Rogal patent, and to offer licenses under it.

The district court, in its opinion (at A32-34), also noted that Valutron's lack of funding argument was factually unsupportable.

> Valutron also attempts to justify the lengthy delay by arguing that it could not initiate licensing and enforcement proceedings without sufficient funding. This argument fails both factually and legally. As a general rule, a lack of funds does not excuse a delay in bringing suit. Naxon Telesign Corp. v. Bunker Ramo Corp., 686 F.2d 1258 (7th Cir. 1982); MGA, 639 F. Supp. at 1242.

> Nor does the evidence in this case support Valutron's claim of pecuniary hardship. Although Hill testified that he needed $500,000 before he could institute legal proceedings, the basis for that belief was never set forth. Indeed, Hill began threatening companies with enforcement procedures in 1978, at which time only $180,000 had been raised. Hill testified that he was fully aware that his actions could have led to a declaratory judgment action

being filed by one or more of the alleged infringers and, therefore, was apparently of the belief that he could at least afford to begin litigation with less than $500,000.

Valutron received an additional $45,000 in 1979, and $120,000 in 1980. While Hill still hadn't reached the "magic number" of $500,000, he had amassed a sizeable sum. Moreover, Hill had been receiving funding steadily since 1976 and, armed with an opinion of counsel from a leading patent law firm suggesting that Valutron had a viable claim against NCR and Singer, had no reason to believe that continued investments would not be forthcoming. Therefore, this Court cannot accept Valutron's argument that lack of funds justifiably excused its dilatory conduct.[4]

[4] In addition, this Court notes that Valutron, if it was serious in its intent to enforce the Rogal patent, should have been arming its war chest since 1970, when substantial infringement became apparent.

Further, in its post trial brief, Valutron stated that "[e]arly in 1978 Dr. Hill had enough money in hand to begin, if not to finish the licensing and enforcement he had planned ... ."

C. THE DISTRICT COURT WAS CAREFUL NOT TO SHIFT THE BURDEN OF PROOF

Valutron, in its petition (at 27-28), asserts that "the District Court completely misconstrued the effect of a presumption under Federal Rule of Evidence 301 and improperly shifted the burden of proof for the defense of laches." In this regard, Valutron, in its petition (at 29), asserts that "it is reversible error to continue improperly to apply a presumption and thereby improperly to shift the burden of persuasion on a dispositive issue." Similarly, Valutron, in its petition (at 29), notes that "a presumption does not shift the burden of proof."

However, the district court was careful not to shift the burden of proof and its opinion included repeated references to this fact. More particularly, the district court pointed out that "[t]he court [Federal Circuit] also 'reiterate[d] that, at all times, the defendant bears the ultimate burden of persuasion of the affirmative defense of laches.' Id. at 1038." A21-22. Similarly, the district court noted that "NCR has successfully set forth at least a presumption of unreasonable delay and material prejudice, thus shifting the burden of production (but not the burden of persuasion) to Valutron to rebut this presumption." A27-28. Likewise, the district court noted that "NCR maintains at all times the ultimate burden of persuasion on its laches defense." A37.

IV. CONCLUSION

For the reasons set forth above, Valutron's petition should be denied.

Respectfully submitted,

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